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# Filling the D.C. Circuit Vacancies

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## Filling the D.C. Circuit Vacancies

### **Erratum**

Note: This Early Winter issue replaces the normal Fall issue of the Indiana Law Journal.

# Filling the D.C. Circuit Vacancies

CARL TOBIAS\*

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## INTRODUCTION

Partisanship undermines judicial nominations to the U.S. Court of Appeals for the District of Columbia Circuit. With three of eleven judgeships vacant during Barack Obama's first term, he was the only President in a half century not to appoint a jurist to the nation's second-most important court. Confirming accomplished nominees, thus, became imperative for the circuit's prompt, economical, and fair case disposition. In 2013, Obama submitted excellent candidates. Patricia Millett had argued thirty-two Supreme Court appeals;<sup>1</sup> Cornelia Pillard successfully litigated numerous path-breaking matters;<sup>2</sup> and Robert Wilkins had served on the D.C. District bench for three years.<sup>3</sup> The purportedly shrinking tribunal caseload<sup>4</sup> and concerns about Pillard's supposed ideological perspectives spurred Republicans to filibuster each nominee,<sup>5</sup> initiatives which multiple cloture petitions did not

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\* Williams Chair in Law, University of Richmond. I wish to thank Michael Gerhardt, Margaret Sanner, and Kevin Walsh for valuable suggestions; Thomas DiStanislao, Katie Lehen, and Cassie Sheehan for exceptional research; Karen Berry and Leslee Stone for excellent processing; and Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Remaining errors are mine.

1. Presidential Statement on Senate Confirmation of Patricia A. Millett as a Judge on the United States Court of Appeals for the District of Columbia Circuit, 2013 DAILY COMP. PRES. DOC. 1 (Dec. 10, 2013).

2. See Presidential Statement on Senate Confirmation of Cornelia T.L. "Nina" Pillard as a Judge on the United States Court of Appeals for the District of Columbia Circuit, 2013 DAILY COMP. PRES. DOC. 1 (Dec. 12, 2013).

3. 159 CONG. REC. S8088 (daily ed. Nov. 18, 2013) (statement of Sen. Cardin).

4. See *id.* at S8089 (statement of Sen. Hatch) (identifying the D.C. Circuit as "a court that needs no more judges").

5. See Al Kamen, *Senate Committee Approves Obama Nominee for D.C. Circuit*, WASH. POST, Sept. 20, 2013, <http://www.washingtonpost.com/blogs/in-the-loop/wp/2013/09/20/senate-committee-approves-obama-nominee-for-d-c-circuit/> [http://perma.cc/S59L-8M9B]; Todd Ruger, *Nina Pillard Nomination for D.C. Circuit Advances*, BLT: BLOG OF LEGALTIMES (Sept. 19, 2013, 12:24 PM), <http://legaltimes.typepad.com/blt/2013/09/nina-pillard-nomination-for-dc-circuit-advances.html> [http://perma.cc/END2-SX43].

surmount.<sup>6</sup> Because the President's able, mainstream recommendations deserve thorough, expeditious Senate review with positive or negative final votes, Democrats cautiously revised filibuster strictures to allow upper-chamber ballots,<sup>7</sup> and the individuals captured approval.<sup>8</sup>

This controversy enhances appreciation of the D.C. Circuit, particularly selection practice, while simultaneously illuminating and exacerbating the critically deteriorated Republican and Democratic relations that plague Senate consideration of additional court nominees as the 114th Congress proceeds. Accordingly, the dispute merits scrutiny. This Article's initial section posits a D.C. Circuit snapshot. Part II surveys all three prospects' confirmations. Part III assesses consequences of, and extracts lessons from, the specific processes recounted. Part IV proffers suggestions for improvement.

### I. A SKETCH OF THE D.C. CIRCUIT

The court's history<sup>9</sup> warrants brief treatment. Some aspects differentiate D.C. Circuit appointments from appointments to other regional circuits. The court hears challenges to agency choices which profoundly affect millions and cost billions<sup>10</sup> yet has narrower jurisdiction,<sup>11</sup> deciding fewer "social policy" questions, such as issues regarding capital punishment, sexual-orientation discrimination, and same-sex marriage, which can make nominees appear controversial.<sup>12</sup> Presidents have also

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6. 159 CONG. REC. S8092 (daily ed. Nov. 18, 2013) (Wilkins); 159 CONG. REC. S7949 (daily ed. Nov. 12, 2013) (Pillard); 159 CONG. REC. S7706 (daily ed. Oct. 31, 2013) (Millett).

7. See 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013); Paul Kane, *Senate Eliminates Filibusters on Most Nominees*, WASH. POST, Nov. 22, 2013, at A1.

8. 160 CONG. REC. S283 (daily ed. Jan. 13, 2014) (Wilkins); 159 CONG. REC. S8667 (daily ed. Dec. 11, 2013) (Pillard); 159 CONG. REC. S8584 (daily ed. Dec. 10, 2013) (Millett).

9. The background has been chronicled elsewhere. See generally CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT (1999); Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993).

10. See *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, Part 1*, 112th Cong. 4 (2011) [hereinafter *2011 Hearings*] (statement of Sen. Chuck Grassley, Member, S. Comm. on the Judiciary) (noting that the Court "hears cases affecting all Americans, [and] is frequently the last stop for cases involving Federal statutes and regulations"). It also treats separation of powers cases. *E.g.*, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

11. See 28 U.S.C. §§ 41–44 (2012) (originally enacted as Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869); D.C. CODE §§ 11-101, -301 (LexisNexis 2001) (originally enacted as District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473); see also John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77, 387–89 (2006).

12. Circuits have fewer, more critical openings than districts and are courts of last resort for ninety-nine percent of cases. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013).

elevated Justices from the tribunal.<sup>13</sup> The D.C. Circuit's small complement<sup>14</sup> meant openings were rarely disputed until 1999 when two outstanding aspirants had limited review.<sup>15</sup> President George W. Bush's success was mixed.<sup>16</sup> He proposed contested submissions, who provoked stalling that ended with the "Gang of 14" agreement, which permitted filibusters only in "extraordinary circumstances."<sup>17</sup> Democrats stymied two accomplished conservative nominees,<sup>18</sup> but another very qualified lawyer felicitously won confirmation.<sup>19</sup> Thus, the court experienced two vacancies when Obama captured election.

## II. OBAMA ADMINISTRATION SELECTION

### A. Descriptive Analysis

Obama has improved appointment procedures,<sup>20</sup> constantly seeking assistance from both parties.<sup>21</sup> He engaged Senators Patrick Leahy (D-VT), the Judiciary Committee Chair, who set hearings and votes; Harry Reid (D-NV), the Majority Leader, who controlled the floor; and GOP analogues, Chuck Grassley (IA) and

13. Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg were elevated. The D.C. Circuit's location, unlike the regional circuits, lacks senators. This means the President does not need to seek senators' recommendations before nominating, and no senator can block the confirmation process by retaining a "blue slip." These ideas show why Presidents traditionally assume the lead in selection.

14. In 1977, it had nine judges. *See* Act of October 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629, 1632 (expanding D.C. Circuit from nine to eleven judges). In 1990, it had twelve, but in 2008, workloads and caseloads supported transferring one to the Ninth Circuit. *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534, 2543 (2008).

15. They were Elena Kagan and Allen Snyder. *See Judicial Vacancy List for December 1999*, U.S. COURTS (Dec. 1, 1999), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1999/12/vacancies/html> [<http://perma.cc/2H8E-RVX9>].

16. *See* Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Sara Schiavoni, *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252 (2007) (noting number of judicial vacancies filled during Bush Administration); Tobias, *supra* note 12, at 2235–38 (noting criticism of Bush's circuit nominations); Jeremy W. Peters, *Eye on Legacy, Obama Shapes Appeals Courts*, N.Y. TIMES, Sept. 14, 2014, at A1 (noting that Obama lagged behind Bush in appointments during his first term).

17. They were Janice Rogers Brown and Brett Kavanaugh. Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama's First Term Judiciary: Picking Judges in the Minefield of Obstruction*, 97 JUDICATURE 7, 18 (2013); Carl Hulse, *Bipartisan Group in Senate Averts Judge Showdown*, N.Y. TIMES, May 24, 2005, at A1.

18. The nominees were Miguel Estrada and Peter Keisler. Goldman et al., *supra* note 17, at 29–30.

19. The lawyer was Thomas Griffith. *Id.* at 29; Editorial, *Three Nominees*, WASH. POST, Mar. 17, 2005, at A24.

20. Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama's Judiciary at Midterm*, 94 JUDICATURE 262 (2011); Tobias, *supra* note 12.

21. Tobias, *supra* note 12, at 2240; *see* Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court Seat*, N.Y. TIMES, May 27, 2009, at A1.

Mitch McConnell (KY),<sup>22</sup> who hold the positions today.<sup>23</sup> Despite concerted attempts, Republicans nominally cooperated. Although Democrats promptly scheduled hearings,<sup>24</sup> the minority party held over ballots, for capable possibilities whom it approved the next week, for seven days without explaining why.<sup>25</sup> McConnell collaborated little to schedule final votes, and his colleagues placed anonymous or unsubstantiated holds on well-qualified consensus nominees; this frustrated appointments, demanding cloture.<sup>26</sup> The GOP aggressively sought plentiful, unnecessary roll call ballots and debate time.<sup>27</sup> Upon Obama's inauguration, the D.C. Circuit had two empty judgeships.<sup>28</sup> These machinations show why he proffered the initial nominee, Caitlin Halligan, at 2010's conclusion and the second, Srikanth Srinivasan, twenty months later.<sup>29</sup> The consideration provided both aspirants enlarges comprehension of three nominations one year thereafter, although the first seems a more instructive roadmap.

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22. Tobias, *supra* note 12, at 2242.

23. Ashley Parker, *Chastened Republicans Beat Democrats at Their Own Ground Game*, N.Y. TIMES, Nov. 8, 2014, at A12; Timothy M. Phelps, *Iowa's Grassley Is First Nonlawyer to Head Senate Judiciary Committee*, L.A. TIMES (Nov. 12, 2014, 7:27 PM), <http://www.latimes.com/nation/la-na-grassley-chairman-20141113-story.html> [<http://perma.cc/QN32-4MA3>].

24. Tobias, *supra* note 12, at 2242; see Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR, Apr. 30, 2009, at A3 (noting that Republicans boycotted the confirmation hearing of Judge David Hamilton because it was "held too quickly").

25. The GOP found most "fine nominees." *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Oct. 15, 2009), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2009-10-15> [<http://perma.cc/6BAE-SKPQ>]; *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Oct. 8, 2009), [http://www.judiciary.senate.gov/meetings/time-change\\_executive-business-meeting](http://www.judiciary.senate.gov/meetings/time-change_executive-business-meeting) [<http://perma.cc/R54N-E6RT>].

26. See 156 CONG. REC. 2046 (2010); 155 CONG. REC. 27,799–800 (2009); see generally Ryan J. Owens, Daniel E. Walters, Ryan C. Black & Anthony Madonna, *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 368 (discussing holds as an "obstructive tactic").

27. It even sought a roll call ballot and sixty minutes but used only five for able picks like Judge Beverly Martin; she won approval 97–0. 156 CONG. REC. 249, 253 (2010); see Doug Kendall, *The Bench in Purgatory*, SLATE (Oct. 26, 2009, 9:34 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/10/the\\_bench\\_in\\_purgatory.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html) [<http://perma.cc/QMC6-QSVU>].

28. Chief Justice Roberts's elevation and Judge Raymond Randolph's assumption of senior status created the vacancies. See U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY – 110TH CONGRESS (2008), available at <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2008/12/vacancies/pdf> [<http://perma.cc/3YUM-KPGX>].

29. Judges Douglas Ginsburg and David Sentelle later assumed senior status. *Judicial Vacancy List for March 2013*, U.S. COURTS (Mar. 1, 2013), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2013/03/vacancies/html> [<http://perma.cc/4UNY-UW4E>] (Sentelle); *Judicial Vacancy List for November 2011*, U.S. COURTS (Nov. 1, 2011), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2011/11/vacancies/html> [<http://perma.cc/ZQB4-NUEV>] (Ginsburg).

## 1. Caitlin Halligan

When nominating Caitlin Halligan, Obama mainly described her as a “nationally-recognized appellate litigator who has practiced extensively before the Supreme Court . . . .”<sup>30</sup> She worked for preeminent jurists and major law firms,<sup>31</sup> became New York Solicitor General,<sup>32</sup> and later directed Weil, Gotshal & Manges’s appellate group.<sup>33</sup> The panel did not set a 2010 hearing,<sup>34</sup> which meant the nomination expired.<sup>35</sup> Obama renominated Halligan once the 112th Congress assembled.<sup>36</sup> During a February hearing, GOP members tendered politically charged queries.<sup>37</sup> Grassley wondered if the “Second Amendment protects [gun] rights;” Halligan explained the Court affirmed this, vowing to follow the Court’s precedent.<sup>38</sup> Other Republicans challenged a New York Bar assertion that chief executives lack authority to indefinitely detain enemy combatants,<sup>39</sup> a view Halligan rejected as “clearly incorrect.”<sup>40</sup> The senators also explored whether the putative decline of appeals eliminated the need to fill the vacancy.<sup>41</sup> Democrats urged that cases and appeals’ complexity had grown.<sup>42</sup> Halligan was reported after limited panel

30. Office of the Press Sec’y, *President Obama Names Two to U.S. Circuit Courts*, WHITE HOUSE (Sept. 29, 2010), <https://www.whitehouse.gov/the-press-office/2010/09/29/president-obama-names-two-us-circuit-courts-0> [<http://perma.cc/XUV9-FXJH>]; see *2011 Hearings*, *supra* note 10, at 10–11 (statement of Sen. Chuck Schumer, Member, S. Comm. on the Judiciary).

31. She clerked for D.C. Circuit Judge Patricia Wald and Justice Stephen Breyer and worked at New York firms. Office of the Press Sec’y, *supra* note 30.

32. *Id.*; see Linda Greenhouse, *Rock Bottom*, N.Y. TIMES: OPINIONATOR (Dec. 14, 2011, 9:00 PM), <http://opinionator.blogs.nytimes.com/2011/12/14/rock-bottom/> [<http://perma.cc/3PTE-AGB7>].

33. She returned to public service in 2010 as General Counsel for the New York County District Attorney’s Office. Office of the Press Sec’y, *supra* note 30.

34. Senators adjourned the day she was named. See H.R. Con. Res. 321, 111th Cong., 156 CONG. REC. 17,001 (2010); see also Carl Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985 (2012).

35. It expired when Congress left to campaign. See 156 CONG. REC. 23,566 (2010).

36. *112th Congress - Judicial Nominations*, U.S. DEP’T OF JUSTICE ARCHIVES, <http://www.justice.gov/archive/olp/nominations112.htm> [<http://perma.cc/8K3J-EMU7>].

37. “Judicial activism,” gun control, and terrorism were some. See *2011 Hearings*, *supra* note 10, at 13–24 (questions of Sens. Grassley, Kyl, and Lee, Members, S. Comm. on the Judiciary). “Judicial activism” cannot be objectively identified. See generally KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006).

38. *2011 Hearings*, *supra* note 10, at 14; see also Gail Collins, Op-Ed., *Talk of the Town*, N.Y. TIMES, Mar. 7, 2013, at A27 (arguing that Senator McConnell’s filibuster of Halligan was “partly a bow to the National Rifle Association”).

39. *2011 Hearings*, *supra* note 10, at 12–13.

40. *Id.* at 13. She worked little on the report containing the Bar’s assertion and was acutely aware of terrorism’s danger. See *id.* at 13, 17.

41. They minimally pursued this issue. See *id.* at 4, 19 (statements of Sens. Grassley and Lee).

42. They grew after the GOP voted to “fill the 10th and 11th seats.” *Id.* at 9 (statement of Sen. Schumer). Halligan was tapped for the tenth.

discussion.<sup>43</sup> Grassley repeated the claim of activism and concern about dockets.<sup>44</sup> Halligan's champions refuted the activism construct<sup>45</sup> and said filings had expanded.<sup>46</sup>

In December, when Republicans opposed a floor vote, the majority petitioned for cloture, which no GOP senator except Lisa Murkowski (AK) favored.<sup>47</sup> The chamber aired issues which resembled those presented earlier.<sup>48</sup> Grassley contested the nominee's "activist record"<sup>49</sup> while finding the court has "too many seats and . . . is an underworked circuit."<sup>50</sup> Leahy deemed Halligan excellent<sup>51</sup> and he probed caseload concerns by emphasizing the appeals' complexity.<sup>52</sup> Senator Richard Durbin (D-IL) perceived "no legitimate questions about her competence, ethics, temperament, or ideology."<sup>53</sup> The Senate returned Halligan's nomination to the

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43. A March party-line vote was 10–8. S. COMM. ON THE JUDICIARY, 112TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING 1 (Mar. 10, 2011), *available at* <http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-03-10-2011.pdf> [<http://perma.cc/UZB2-7T32>].

44. He alone spoke in opposition, basing activism on client advocacy and ignoring her testimony. *See Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Mar. 10, 2011), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2011-03-10> [<http://perma.cc/995H-42EA>] (statement of Sen. Grassley).

45. She had an advocacy duty. *See id.* (statements of Sens. Leahy and Schumer); David Ingram, *Gun Advocates Step in To Oppose D.C. Circuit Pick*, BLT: BLOG OF LEGAL TIMES (Mar. 10, 2011, 12:48 PM), <http://legaltimes.typepad.com/blt/2011/03/dc-circuit-pick-becomes-proxy-for-gun-debate.html> [<http://perma.cc/WXB6-SRHB>].

46. *Executive Business Meeting*, *supra* note 44.

47. 157 CONG. REC. S8361 (daily ed. Dec. 6, 2011); Charlie Savage & Raymond Hernandez, *Filibuster by Senate Republicans Blocks Confirmation of Judicial Nominee*, N.Y. TIMES, Dec. 7, 2011, at A16.

48. They were raised in the hearing and panel debate. *See supra* notes 38–41, 44 and accompanying text.

49. 157 CONG. REC. S8350 (daily ed. Dec. 6, 2011); *see* Dahlia Lithwick, *Punch and Judge Judy: Senate Republicans Spend a Long Day Protecting the Courts in Order To Trash Them*, SLATE (Dec. 6, 2011, 7:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/caitlin\\_halligan\\_filibuster\\_senate\\_republicans\\_spend\\_a\\_day\\_protecting\\_the\\_courts\\_just\\_to\\_trash\\_them.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/caitlin_halligan_filibuster_senate_republicans_spend_a_day_protecting_the_courts_just_to_trash_them.html) [<http://perma.cc/X8NL-WH5E>] (describing the Republican vote to deny cloture).

50. 157 CONG. REC. S8351 (daily ed. Dec. 6, 2011). Grassley ignored complexity, saying U.S. Courts Administrative Office (AO) data show cases "decreased markedly." *Id.* McConnell conflated advocacy and activism, decrying Halligan's briefs. *Id.* at S8346–47.

51. Leahy refuted criticisms of Halligan on the Second Amendment, affirmative action, enemy combatants, and federalism by arguing Halligan was advocating for clients, analogizing her experience to that of Chief Justice Roberts, who supported zealous client advocacy. *Id.* at S8353–56 (daily ed. Dec. 6, 2011); *id.* at S8169–74 (daily ed. Dec. 5, 2011).

52. Congress created an eleven-judge court; AO data showed a fourth of seats open and "caseload per active judge [rose] one third since 2005;" and the GOP approved four Bush picks, but Obama confirmed none. *Id.* at S8172–73 (daily ed. Dec. 5, 2011).

53. *Id.* at S8348 (daily ed. Dec. 6, 2011). She was mainstream, not overly conservative or liberal, while concerns about political balance and payback for delaying GOP nominees explained the cloture vote. *See generally* Owens et al., *supra* note 26, at 351 (noting the role of ideology in senators' use of blue slips).



President eleven days later.<sup>54</sup> In mid-2012, Obama again proposed her,<sup>55</sup> but the nomination languished.<sup>56</sup> On January 4, 2013, he renominated Halligan.<sup>57</sup> She won February panel approval without discussion.<sup>58</sup> Republicans eschewed a final ballot, so Democrats pursued cloture,<sup>59</sup> which received one GOP senator's vote, when Grassley and McConnell insistently expressed concerns over filings and what they viewed as Halligan's consistently predictable activism.<sup>60</sup> Democrats countered that she was fine;<sup>61</sup> a number addressed criticisms of Halligan's purported activism, strong client representation and ideology,<sup>62</sup> and plummeting D.C. Circuit cases.<sup>63</sup> Obama decried the filibuster, lauding Halligan's "ethical ideals";<sup>64</sup> explained she "is

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54. 157 CONG. REC. S8769, D1384 (daily ed. Dec. 17, 2011).

55. See *Judicial Vacancy List for July 2012*, U.S. COURTS (July 1, 2012), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2012/07/vacancies/html> [<http://perma.cc/86RD-ZY4T>]; see also Charlie Savage, *Obama Nominates Two to Appeals Court*, N.Y. TIMES: THE CAUCUS (June 11, 2012, 5:00 PM), <http://thecaucus.blogs.nytimes.com/2012/06/11/obama-nominates-two-to-appeals-court/> [<http://perma.cc/8CDG-7BJB>].

56. The nomination expired when Congress adjourned. See 159 CONG. REC. S16, S18 (daily ed. Jan. 3, 2013).

57. *Judicial Vacancy List for February 2013*, U.S. COURTS (Feb. 1, 2013), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2013/02/vacancies/html> [<http://perma.cc/QHT2-XXKW>]. Delay frustrated Democrats who pondered filibuster reform in early 2013 but delayed major change due to GOP promises of greater cooperation. See 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013); 159 CONG. REC. S5625–61 (daily ed. July 11, 2013); 159 CONG. REC. S247–71 (daily ed. Jan. 24, 2013); *infra* note 97.

58. See *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Feb. 14, 2013), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2013-02-14> [<http://perma.cc/3X7V-WVM9>]. Senator Lindsey Graham (R-SC) passed. *Id.*

59. 159 CONG. REC. S1146 (daily ed. Mar. 6, 2013) (cloture vote). Estrada's invocation evoked payback. See 159 CONG. REC. S1139–40 (daily ed. Mar. 6, 2013); *supra* note 18 and accompanying text.

60. See 159 CONG. REC. S1139 (daily ed. Mar 6, 2013) (statement of Sen. McConnell); 159 CONG. REC. at S1141 (statement of Sen. Grassley); 159 CONG. REC. S1143 (statement of Sen. McCain) ("Ms. Halligan's demonstrated record of judicial activism . . . meets 'extraordinary circumstances . . . .'"); Paul Kane, *Court Pick Blocked by GOP Filibuster*, WASH. POST, Mar. 7, 2013, at A3.

61. They cited her avid client advocacy, invoking Chief Justice Roberts again. 159 CONG. REC. S1098–99, S1105–06 (daily ed. Mar. 5, 2013) (statements of Sens. Durbin and Leahy); see *supra* note 51.

62. Democrats stated that accusations of activism lack content and that zealous advocacy and putative ideology are not extraordinary circumstances that would justify a filibuster; neither honors the accord's terms or spirit or disaggregates counsel, personal, and client views. 159 CONG. REC. S1098, S1105, S1111, S1114–15 (daily ed. Mar. 5, 2013) (statements of Sens. Durbin, Leahy, Cardin, Coons, and Schumer).

63. Rather than having a plummeting number of cases, the D.C. Circuit actually has a growing number of cases, many of which are complex. See *id.* at S1096, S1106, S1114 (statements of Sens. Reid, Leahy, and Schumer). Use of diverse times and measures, such as types of cases or judges, explains some disparities. Yet, certain ideas, namely case numbers, conflict. *Id.* at S1114 (statements of Sens. Coons and Schumer); see *infra* note 159.

64. Presidential Statement on Senate Action To Block the Nomination of Caitlin J.

well within the mainstream”;<sup>65</sup> and urged that a notable Republican Gang of 14 member conceded “only an ethics or qualification issue—not ideology—would” substantiate a filibuster.<sup>66</sup> Halligan promptly withdrew.<sup>67</sup>

The discourse’s rhetorical quality complicates exact identification of reasons for the loss, which essentially means that unstated views were significant.<sup>68</sup> Extrapolating from Halligan’s zealous client advocacy that she could prove to be an activist judge, the GOP apparently opposed cloture not because Halligan was conclusively moderate or extreme but because it disagreed with her projected jurisprudence.<sup>69</sup> Repeatedly denying Halligan floor votes also revealed the sustained unproductive dynamic that now riddles the “confirmation wars.”<sup>70</sup> In any event, the parties seemed most concerned about ideological balance.<sup>71</sup> Halligan’s defeat effectively informs understanding of the latest nominees, especially Pillard, and the role that ideology can assume. But Halligan’s protracted process markedly contrasts with the second nominee’s comparatively expeditious confirmation process.

## 2. Srikanth Srinivasan

On June 11, 2012, Obama nominated Srikanth Srinivasan,<sup>72</sup> the Principal Deputy U.S. Solicitor General, proclaiming Srinivasan was recognized as a leading Court

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Halligan To Be a Judge on the United States Court of Appeals for the District of Columbia Circuit, 2013 DAILY COMP. PRES. DOC. 1 (Mar. 6, 2013).

65. *Id.*

66. *Id.*; see 159 CONG. REC. S8076 (daily ed. Nov. 18, 2013) (identifying Gang member as Sen. Lindsey Graham).

67. Letter from Caitlin J. Halligan to President Barack Obama (Mar. 22, 2013), *available at* [http://www.washingtonpost.com/blogs/post-politics/files/2013/03/CJH-letter-3\\_22\\_2013.pdf](http://www.washingtonpost.com/blogs/post-politics/files/2013/03/CJH-letter-3_22_2013.pdf) [<http://perma.cc/AG7N-VFYV>].

68. Leahy said both parties engaged in delay, suggesting payback. 159 CONG. REC. S2914 (daily ed. Apr. 24, 2013); 158 CONG. REC. S20 (daily ed. Jan. 23, 2012); *see also* Linda Greenhouse, *Of Judges and Judging*, N.Y. TIMES: OPINIONATOR (Apr. 17, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/04/17/of-judges-and-judging/> [<http://perma.cc/BA49-PL54>] (referring to the D.C. Circuit as a “political football” while addressing Senator Grassley’s bill to eliminate three judgeships to achieve political balance).

69. The GOP argued that Democrats similarly treated Bush nominees. 159 CONG. REC. S1140–42 (daily ed. Apr. 15, 2013) (statements of Sens. McConnell and Grassley). *But see* 159 CONG. REC. at S2644 (daily ed. Mar. 6, 2013) (statement of Sen. Leahy).

70. The GOP has greater responsibility because its lack of cooperation meant that U.S. vacancies were near ten percent for an unprecedented half decade. *See* DENISE A. CARDMAN, AM. BAR ASS’N, ARTICLE III VACANCIES: STATISTICS BY THE MONTH 2009-PRESENT (last updated Oct. 1, 2015), *available at* <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/vacanciesbymonth.authcheckdam.pdf> [<http://perma.cc/FVL4-C7LF>] (near ten percent vacancy rate); *see also* Goldman et al., *supra* note 17, at 13 (noting White House Senior Counsel Christopher Kang’s view that “the vacancy rate has never been this high for so long”).

71. Some senators intimidated the GOP would oppose any nominee to keep balance. 159 CONG. REC. at S1114–15, S1139 (daily ed. Mar. 5, 2013) (statements of Sens. Schumer and Durbin); *see also* Editorial, *Courts Without Judges*, N.Y. TIMES, Apr. 7, 2013, at SR10.

72. Srinivasan was nominated when Halligan was renominated. *See* Savage, *supra* note 55.

advocate<sup>73</sup> who had chaired the O'Melveny & Myers appellate section.<sup>74</sup> That presidential election year, he was not canvassed.<sup>75</sup> In January, Obama renominated Srinivasan.<sup>76</sup> During the April hearing, which proceeded smoothly, Republicans extolled his capabilities and posed few queries.<sup>77</sup> Grassley declared he intended to sponsor the Court Efficiency Act of 2013, which would place two D.C. Circuit judgeships in other appeals courts and eliminate a third.<sup>78</sup> On May 16, the panel unanimously reported Srinivasan and discussed him only in positive ways, yet GOP senators raised a "court packing" allegation while voicing concern about caseloads, even as Democrats countered the notions.<sup>79</sup> Because McConnell would not agree to a Senate ballot, the majority petitioned for cloture<sup>80</sup> and Srinivasan readily captured appointment with practically no debate,<sup>81</sup> but Senator Mike Lee (R-UT) reiterated the court-packing accusation.<sup>82</sup>

In short, President Obama carefully nominated Halligan, yet the GOP apparently consulted little objective evidence in deciding to make her wait longer than over 350 remaining nominees on a final vote that never materialized, while Srinivasan did attain rather prompt confirmation. The strikingly disparate review of these two nominees defies explanation, as both had represented controversial perspectives and

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73. Office of the Press Sec'y, *President Obama Nominates Two To Serve on the U.S. Court of Appeals for the District of Columbia Circuit*, WHITE HOUSE (June 11, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/11/president-obama-nominates-two-serve-us-court-appeals-district-columbia-c> [http://perma.cc/2JHP-7STN]. Srinivasan had argued twenty Supreme Court cases. *Id.*

74. *Id.* The pick clerked for Fourth Circuit Judge J. Harvie Wilkinson and Justice Sandra Day O'Connor. *Id.*

75. See *supra* note 56 (nomination expired with presidential election year adjournment).

76. See *supra* note 57; see also Goldman et al., *supra* note 17, at 30.

77. *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, Part 2*, 113th Cong. 91–101 (2013) [hereinafter *Srinivasan Hearing*] (statements of Sens. Hatch, Lee, and Cruz, Members, S. Comm. on the Judiciary); see Jeremy W. Peters, *Easy Hearing for Obama's Choice for Court*, N.Y. TIMES, Apr. 11, 2013, at A14.

78. *Srinivasan Hearing*, *supra* note 77, at 8 (statement of Sen. Grassley); S. 699, 113th Cong. (2013); see also Jeremy W. Peters, *Republican Effort to Unpack the Court*, N.Y. TIMES: THE CAUCUS (Apr. 11, 2013, 4:04 PM), <http://thecaucus.blogs.nytimes.com/2013/04/11/republican-effort-to-unpack-the-court/> [http://perma.cc/J5LF-J9W3]. Grassley's bill conflicts with Judicial Conference judgeship recommendations based on conservative caseload and workload estimates in empirical data. See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18–19 (Mar. 12, 2013) (recommending addition of one judge for the Sixth Circuit and four judges for the Ninth Circuit); see also Fed. Judgeship Act of 2013, S.1385, 113th Cong. (2013) (proposing addition of judgeships per the Judicial Conference's recommendations).

79. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (May 16, 2013), <http://www.judiciary.senate.gov/meetings/continuation-executive-business-meeting-2013-05-16> [http://perma.cc/PSV4-AKYS] (statements of Sens. Grassley, Leahy and Lee). President Franklin Roosevelt employed court packing in the 1930s. JEFF SHESOL, *SUPREME POWER* (2010).

80. 159 CONG. REC. S3698 (daily ed. May 21, 2013).

81. *Id.* at S3815 (daily ed. May 23, 2013) (97–0 approval).

82. See *id.* at S3812 (statement of Sen. Lee).

litigants.<sup>83</sup> Twice denying a superb mainstream nominee's floor ballot presaged fraught consideration which the recent aspirants directly confronted.

### 3. The Three Recent Nominees

When introducing all three of the most recent nominees, Obama claimed they earned the best ABA rating and that a third of court slots were vacant,<sup>84</sup> meaning it needed more judges;<sup>85</sup> was delighted that Republicans "chose not to play politics" by delaying Srinivasan, as with Halligan; and hoped to capitalize on this progress.<sup>86</sup> Obama refuted GOP assertions that the submissions were an attempt at court packing: "We're not adding seats here. We're trying to fill seats that are already existing."<sup>87</sup>

#### a. Patricia Millett

In selecting Patricia Millett, Obama depicted the nominee as one of the country's finest appellate counsel, who until recently had argued "the most Supreme Court" appeals by a woman,<sup>88</sup> praising her nonpartisan work in the Solicitor General's Office.<sup>89</sup> During a July hearing, many GOP legislators found the choice exceptional, asking virtually no probing queries.<sup>90</sup> However, a few questioned whether the court required jurists, and Senator Ted Cruz (R-TX) alleged the circuit "has been a battleground on both sides for the politicization of judicial nominations" and even contended Obama and senior lawmakers were court packing because they disliked

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83. The views and clients Halligan had represented may appear comparatively liberal and more easily caricatured than Srinivasan's. The GOP might also have differentiated the New York and U.S. Solicitors General, but Srinivasan did work on *United States v. Windsor*, 133 S. Ct. 2675 (2013), and other controversial matters.

84. Remarks on the Nominations of Patricia A. Millett, Cornelia T.L. "Nina" Pillard, and Robert L. Wilkins To Be Judges on the United States Court of Appeals for the District of Columbia, 2013 DAILY COMP. PRES. DOC. 1, 1–2 (June 4, 2013) [hereinafter Remarks].

85. See *id.*; Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24.

86. Remarks, *supra* note 84, at 2. But see Gail Collins, Op-Ed., *The Public Needs a Nap*, N.Y. TIMES, Nov. 21, 2013, at A35 (suggesting that GOP was playing politics with three D.C. Circuit nominees).

87. Remarks, *supra* note 84, at 3 (noting that the Judicial Conference of the United States, which is chaired by Chief Justice Roberts, "told the Senate that the current workload before the DC Circuit requires 11 judges"); see *supra* text accompanying note 79.

88. Remarks, *supra* note 84; Sarah Wheaton and Kitty Bennett, *Obama's Appeals Court Nominees*, N.Y. TIMES: THE CAUCUS (June 4, 2013, 12:57 PM), <http://thecaucus.blogs.nytimes.com/2013/06/04/obamas-appeals-court-nominees/> [<http://perma.cc/GG4Y-3VPJ>].

89. She served in the Office for Democratic and Republican Presidents. Remarks, *supra* note 84, at 2.

90. See, e.g., *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, Part 4*, 113th Cong. 90–92 (2013) [hereinafter *2013 Hearings*] (statement of Sen. Michael S. Lee, Member, S. Comm. on the Judiciary); see also John Gramlich, *Republicans Unveil Arguments Against Obama's D.C. Circuit Picks*, CQ (July 10, 2013, 4:49 PM), <http://www.cq.com/doc/news-4312190?0&search=YXJ9xqRG> [<http://perma.cc/68L9-NSUE>].

the “outcomes of judges applying the law fairly.”<sup>91</sup> Republicans who spoke on Millett in the next month’s panel discussion candidly acknowledged her stunning qualifications yet enunciated concern about the necessity for the positions.<sup>92</sup> Democrats concurred as to her competence but asserted the court merited the jurists and reminded the GOP that it had quickly confirmed the ninth, tenth, and eleventh judges in Bush’s tenure.<sup>93</sup> Following much spirited debate,<sup>94</sup> the nominee achieved a 10–8 party-line vote.<sup>95</sup> The minority refused a final ballot, so Democrats pursued October cloture which failed.<sup>96</sup> However, they adopted the “nuclear option,” so a majority vote could rapidly terminate filibusters,<sup>97</sup> and a November cloture petition succeeded<sup>98</sup> before her approval three weeks later.<sup>99</sup>

#### b. Cornelia Pillard

When Obama tapped Cornelia Pillard, he insisted she evinced “an unshakeable commitment to the public good” by defending the Family and Medical Leave Act’s constitutionality and successfully arguing for the opening of the Virginia Military Institute to female students.<sup>100</sup> Obama claimed her appointment would continue the “tradition” of esteemed academics becoming D.C. Circuit jurists “from Antonin Scalia to Ruth Bader Ginsburg.”<sup>101</sup> In the July hearing, GOP legislators pressed concerns about filings.<sup>102</sup> Several sharply criticized Pillard’s nuanced beliefs and

91. 2013 *Hearings*, *supra* note 90, at 95. He said able Bush nominees were blocked and his views were “irrespective of [her] very fine professional qualifications.” *Id.* at 96; *see also* Richard Wolf, *Republicans Signal a Fight over Obama’s Court Nominees*, USA TODAY (July 10, 2013, 1:35 PM), <http://www.usatoday.com/story/news/politics/2013/07/10/senate-judiciary-patricia-millett-republicans-democrats-appeals-judges-supreme-court/2505643/> [<http://perma.cc/QBK5-2FRN>].

92. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Aug. 1, 2013), <http://www.judiciary.senate.gov/meetings/executive-business-meeting-2013-08-01> [<http://perma.cc/7WFA-PD9J>]. Cruz and Lee aired court packing again. *Id.*

93. *Executive Business Meeting*, *supra* note 92 (statements of Sens. Leahy and Schumer).

94. It mainly treated court seats. *Executive Business Meeting*, *supra* note 92; *see supra* text accompanying notes 92–93.

95. S. COMM. ON THE JUDICIARY, 113TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING 1 (Aug. 1, 2013), *available at* <http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-08-1-2013.pdf> [<http://perma.cc/4HX4-RE9F>]; *see also* Brent Kendall, *Senate Panel Splits on Judge Nominee*, WALL ST. J.: WASH. WIRE (Aug. 1, 2013, 2:12 PM), <http://blogs.wsj.com/washwire/2013/08/01/senate-panel-splits-on-judge-nominee/> [<http://perma.cc/9CPD-QP5J>].

96. 159 CONG. REC. S7708 (daily ed. Oct. 31, 2013). Debate stressed the need for judges. *See id.*

97. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013) (rule change); Paul Kane, *Senate Eliminates Filibusters on Most Nominees*, WASH. POST, Nov. 22, 2013, at A1.

98. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013).

99. 159 CONG. REC. S8584 (daily ed. Dec. 10, 2013).

100. Remarks, *supra* note 84, at 2. She served as a Deputy Assistant Attorney General, in the Solicitor General’s Office, and at the NAACP Legal Defense and Education Fund. *Id.*

101. *Id.*

102. Grassley read circuit judges’ unsigned views that opposed filling the three vacancies. 2013 *Hearings*, *supra* note 90, at 357–58. Senator Blumenthal (D-CT) raised views of GOP

scholarship on women's equality, abortion, contraception, and religious freedom.<sup>103</sup> Cruz strongly protested by disdainfully repeating the court-packing accusation and claiming that Pillard's "academic writings . . . suggest that [her] views may well be considerably out of the mainstream."<sup>104</sup> The nominee cogently urged that a scholar's endeavor is frequently provocative, and she clearly appreciated the difference between circuit service and lawyering.<sup>105</sup> Yet, certain observers apparently misunderstood or contorted Pillard's writing and testimony, deeming her a judicial activist or a "radical feminist."<sup>106</sup> Democrats reiterated that every slot was important and that the GOP peremptorily confirmed Bush aspirants.<sup>107</sup> On September 19, the committee held discussion and cast ballots. Republican attendees evidenced concerns about the court vacancies and criticized Pillard's ideas espoused in the hearing and scholarship, finding the choice activist or lacking moderation; Democrats contended the nominee was mainstream and the circuit necessarily merited the judges.<sup>108</sup> After relatively laconic discussion, Pillard captured 10–8 approval.<sup>109</sup> When the GOP

D.C. Circuit appointees, such as Chief Justice Roberts, that judges are needed. *Id.* at 358.

103. *See id.* at 432–34, 436–38, 440–42 (statements of Sens. Grassley, Lee, and Cruz).

104. *Id.* at 440–41. Others agreed on court packing. *Id.* at 9–12, 95–96, 436, 440 (statements of Sens. Grassley, Cruz and Lee); *see* Todd Ruger, *D.C. Circuit Nominee Under Fire on Capitol Hill*, BLT: BLOG OF LEGAL TIMES (July 24, 2013, 1:46 PM), <http://legaltimes.typepad.com/blt/2013/07/dc-circuit-nominee-under-fire-on-capitol-hill.html> [<http://perma.cc/4FAN-2BUB>].

105. *2013 Hearings*, *supra* note 90, at 444. She pledged to follow precedent, if confirmed. *Id.* at 445; *see* Richard Wolf, *Obama Judicial Nominee Questioned on Abortion, Religion*, USA TODAY (July 24, 2013, 6:10 PM), <http://www.usatoday.com/story/news/politics/2013/07/24/judicial-nominations-obama-republicans-abortion-religion/2583953/> [<http://perma.cc/5F7E-HDTJ>].

106. Dahlia Lithwick, *Cry of the Republican Male Senator*, SLATE (July 23, 2013, 4:03 PM), [http://www.slate.com/articles/double\\_x/doublex/2013/07/nina\\_pillard\\_s\\_senate\\_judiciary\\_committee\\_hearing\\_republican\\_senators\\_try.html](http://www.slate.com/articles/double_x/doublex/2013/07/nina_pillard_s_senate_judiciary_committee_hearing_republican_senators_try.html) [<http://perma.cc/MP2G-3GM3>]; *see* Ed Whelan, *D.C. Circuit Nominee Pillard's False and Deceptive Testimony—Part 1*, NAT'L REV. (Sept. 4, 2013, 9:21 AM), <http://www.nationalreview.com/bench-memos/357556/dc-circuit-nominee-pillards-false-and-deceptive-testimony-part-1-ed-whelan> [<http://perma.cc/QV6P-8RYX>]; Ed Whelan, *D.C. Circuit Nominee Pillard's False and Deceptive Testimony—Part 2*, NAT'L REV. (Sept. 5, 2013, 9:57 AM), <http://www.nationalreview.com/bench-memos/357684/dc-circuit-nominee-pillards-false-and-deceptive-testimony-part-2-ed-whelan> [<http://perma.cc/N3ZD-73N3>].

107. *2013 Hearings*, *supra* note 90, at 352, 438–39 (statements of Sens. Leahy, Whitehouse, and Klobuchar).

108. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Sept. 19, 2013), <http://www.judiciary.senate.gov/meetings/updated-executive-business-meeting-2013-09-19> [<http://perma.cc/6E2V-N5N7>] (statements of Sens. Feinstein, Grassley, Hatch and Leahy); *see* Al Kamen, *Senate Committee Approves Obama Nominee for D.C. Circuit*, WASH. POST, Sept. 20, 2013, <http://www.washingtonpost.com/blogs/in-the-loop/wp/2013/09/20/senate-committee-approves-obama-nominee-for-d-c-circuit/> [<http://perma.cc/NR4N-DBYA>].

109. S. COMM. ON THE JUDICIARY, 113TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING 1 (Sept. 19, 2013), *available at* <http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-09-19-2013.pdf> [<http://perma.cc/PCK5-6LQ4>]. Ideology is not an extraordinary circumstance. *See supra* text accompanying note 66; *infra* note 139.

resisted a yes or no vote, the majority sought November cloture, which the minority denied,<sup>110</sup> but the rule amendment crucially promoted her December appointment.<sup>111</sup>

c. Robert Wilkins

In tendering Robert Wilkins, Obama declared this was his second request that the jurist undertake public service, because Obama had earlier proffered the nominee for the “DC District Court and the Senate confirmed him without opposition.”<sup>112</sup> Before Wilkins’s recent service “with distinction as a Federal judge,” he was a respected partner in the Venable law firm.<sup>113</sup> At the September 11 hearing, Grassley conceded there was mounting disagreement over the necessity to add judges to the court, grilling Wilkins on multiple controversial questions regarding Pillard’s views, and Lee strenuously probed interpretive theories of the judge, who correctly deflected or responsively answered the queries.<sup>114</sup> Democrats kept arguing the tribunal requires all of its vacancies filled.<sup>115</sup> In October, the committee discussed the nominee and voted. Senators Grassley and Orrin Hatch (R-UT) repeated concerns about filling openings; the majority claimed again the D.C. Circuit had a distinctive, prolonged need for the judges and Republicans had constantly supported more jurists across the Bush years.<sup>116</sup> Following terse debate, the panel reported Wilkins 10–8.<sup>117</sup> The GOP would not concur on a floor ballot, and Democrats introduced a cloture motion that November which the minority rejected,<sup>118</sup> although the filibuster change finally allowed his confirmation in January.<sup>119</sup>

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110. Debate focused on ideology and the judgeships required. 159 CONG. REC. S7949 (daily ed. Nov. 12, 2013); Jeremy W. Peters, *Republicans Again Reject Obama Pick for Judiciary*, N.Y. TIMES, Nov. 13, 2013, at A16.

111. 159 CONG. REC. S8667 (daily ed. Dec. 11, 2013) (confirmation); *see supra* note 97 and accompanying text (rule change).

112. Remarks, *supra* note 84, at 2; *see* Wheaton & Bennett, *supra* note 88.

113. Remarks, *supra* note 84, at 2. He also had been a superb public defender. *Id.*

114. *See 2013 Hearings, supra* note 90, at 945–50. On Pillard’s views and interpretation, Wilkins pledged to follow precedent. *Id.* at 945–47.

115. *Id.* at 1239–40 (statement of Sen. Leahy); *see* Todd Ruger, *Wilkins Breezes Through D.C. Circuit Confirmation Hearing*, BLT: BLOG OF LEGAL TIMES (Sept. 11, 2013, 1:15 PM), <http://legaltimes.typepad.com/blt/2013/09/wilkins-breezes-through-dc-circuit-confirmation-hearing.html> [<http://perma.cc/92YC-XE8U>].

116. *Executive Business Meeting*, U.S. SENATE COMM. ON JUDICIARY (Oct. 31, 2013), <http://www.judiciary.senate.gov/meetings/updated-executive-business-meeting-2013-10-31> [<http://perma.cc/ML3U-MZ4A>] (statements of Sens. Grassley, Hatch and Leahy).

117. S. COMM. ON THE JUDICIARY, 113TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING 1 (Oct. 31, 2013), *available at* <http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-10-31-2013.pdf> [<http://perma.cc/AR96-S92X>]. Discussion emphasized judgeships and minimally involved Wilkins’s qualifications. *Executive Business Meeting, supra* note 116.

118. Debates again stressed the need for judges; only Susan Collins (R-ME) and Murkowski voted yes. 159 CONG. REC. S8092 (daily ed. Nov. 18, 2013); Jeremy W. Peters, *Obama Nominee Is Third in a Row Blocked by G.O.P.*, N.Y. TIMES, Nov. 19, 2013, at A1.

119. 160 CONG. REC. S283 (daily ed. Jan. 13, 2014) (approval); *see supra* note 97 (filibuster change).

*B. Critical Analysis*

Obama's efforts have supplied benefits, placing accomplished, diverse jurists in lengthy vacancies. Consultation with Republicans facilitated specific nominees' approval.<sup>120</sup> Proposing judges, like Wilkins, enables confirmees to invoke experience, so they effectively address large caseloads.<sup>121</sup> Increased ethnic and gender diversity improves comprehension and resolution of core matters, namely abortion, criminal law, and discrimination, which jurists hear.<sup>122</sup> People of color and women correspondingly lessen ethnic, gender, and similar biases which undercut justice.<sup>123</sup> Courts that reflect America foster public confidence.<sup>124</sup> Obama appointees could affect ideological diversity,<sup>125</sup> but concepts which few express trouble the GOP. Insofar as the judges expand this, Obama, even though he downplays ideology,<sup>126</sup> might substantiate the increase because Republican predecessors seated a number of conservatives, especially at the D.C. Circuit.<sup>127</sup>

120. See *supra* text accompanying notes 20–23. He ably set priorities, while cooperation improved selection.

121. Tobias, *supra* note 12, at 2248. Obama named many judges, who can wait long times more easily than attorneys, who have colleagues and clients who may be concerned about their departure for the bench.

122. See generally RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995) (suggesting people of color and women, namely Latino/as, improve comprehension and resolution of core matters); SALLY J. KENNEY, *GENDER AND JUSTICE* (2013) (same, especially as to women); FRANK H. WU, *YELLOW* (2002) (same, especially as to Asian Americans). But see Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (arguing that empirical analysis fails to demonstrate gender's effect on judicial performance).

123. Tobias, *supra* note 12, at 2247, 2249 n.74. Obama set diversity records. Goldman et al., *supra* note 17, at 18.

124. See Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008). Diverse judges ameliorate Senate GOP nullification of popular will expressed in voting by slowing able consensus nominees. See 159 CONG. REC. S7972 (daily ed. Nov. 13, 2013) (statement of Sen. Warren); 159 CONG. REC. S2914 (daily ed. Apr. 24, 2013) (statement of Sen. Leahy).

125. Insofar as judges favor a "living Constitution," they may enhance ideological balance. See David Fontana, *Liberals Can Wear Robes: What a Recent Confirmation Tells Us*, HUFFPOST POLITICS (Aug. 11, 2014, 5:09 PM), [http://www.huffingtonpost.com/david-fontana/liberals-can-wear-rob-w\\_b\\_5669697.html](http://www.huffingtonpost.com/david-fontana/liberals-can-wear-rob-w_b_5669697.html) [<http://perma.cc/2LLT-Q8G2>]. But see Terry Eastland, *Obama's Makeover of the Judiciary*, WKLY. STANDARD, Nov. 17, 2014, at 19. Compare STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* (2010), with ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012).

126. Obama apparently believes that judges should not be agents of social change. Goldman et al., *supra* note 17, at 18; Tobias, *supra* note 12, at 2249; Toobin, *supra* note 85, at 26.

127. Russell Wheeler, *How Might the Obama Administration Affect the Composition of the U. S. Courts of Appeals?*, BROOKINGS (Mar. 18, 2009), <http://www.brookings.edu/research/opinions/2009/03/18-courts-wheeler> [<http://perma.cc/M3JW-JQX9>]; *supra* text accompanying notes 16–19. Thus, his elections were ostensibly mandates for balance. Tobias, *supra* note 12, at 2249.



Certain facets merit enhancement. One was alacrity: D.C. Circuit nominations and confirmations proved tardy. Obama is the sole President since the mid-1970s who mustered no first-term appointment.<sup>128</sup> To the extent processes were long, he bears minimal responsibility. Some ideas can explain delayed nomination. Obama appeared cautious about tapping D.C. Circuit possibilities, lest review devour months and slow numerous others, concerns that Halligan's mixed assessment justified. Principal responsibility for dilatory consideration is fairly assigned to Republicans. They systematically compelled Democrats to apply cloture petitions, notably on all the D.C. Circuit selections,<sup>129</sup> and requested much debate time, yet consumed little, and roll call votes for numbers of easily approved candidates.<sup>130</sup> Phenomena, including the dire recession, which Obama and Congress had limited ability to control, may explicate protracted activity, but GOP recalcitrance, seemingly animated mainly by payback and D.C. Circuit ideological balance, appears to best explain the situation.<sup>131</sup>

Mandating that superior nominees wait prolonged times places careers on hold and dissuades respected lawyers from contemplating the bench.<sup>132</sup> Long waits deprive tribunals of judicial resources they need and erode swift, inexpensive, and equitable case disposition and regard for both confirmation procedures and the coequal branches. Assimilating D.C. Circuit and High Court appointments imposes these deleterious consequences and more.<sup>133</sup>

### C. Summary

Obama sent five very qualified D.C. Circuit nominees. However, the GOP lacked an evidentiary basis for making Halligan wait two years on a vote and delaying three recent nominees.<sup>134</sup> Why Halligan deserved complete processing and lawmakers should have better treated subsequent nominees, accordingly, warrants closer inquiry. Article II, venerable conventions, and lengthy practice suggest capable, uncontroversial prospects (and even talented, contested, mainstream nominees who may supplement ideological balance) require thorough, efficient investigations and comprehensive debates with affirmative or negative chamber ballots. Those are

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128. He had fewer 2009 confirmees than four predecessors but improved later. *See* Tobias, *supra* note 12, at 2246; Peters, *supra* note 16.

129. *See supra* text accompanying notes 26, 64, 77, 96, 111, 119; *infra* text accompanying notes 152, 156.

130. They slowly agreed to votes and debates on reported picks. *See supra* text accompanying notes 26–27.

131. Rapidly filling Supreme Court seats was critical, ending other work. *See* Goldman et al., *supra* note 17, at 10. Obama had to form a government and face complex problems, notably two wars. Tobias, *supra* note 12, at 2253–54.

132. It can stop lawyers from taking cases that may prove controversial and subvert candidacies on both ends of the ideological spectrum. Tobias, *supra* note 12, at 2253; *see* 159 CONG. REC. S5520 (daily ed. July 8, 2013) (statement of Sen. Leahy).

133. *See* Goldman et al., *supra* note 17, at 10. The long hiatus for assessing lower court picks, which Supreme Court nominee analysis requires, has many detrimental ripple effects. It worsens the broken regime's intractable difficulties and can even erode separation of powers and judicial independence. *See infra* note 152 and accompanying text.

134. *See supra* notes 71, 83, 96, 111, 119 and accompanying text.

fundamental precepts that both caucuses endorse.<sup>135</sup> Republicans should have permitted speedy action in which legislators could assiduously explore the merits of nominees' candidacies and quickly vote, because Democrats honored many pressing requests to canvass Halligan and Srinivasan in the pragmatic spirit of consensus and helped confirm four people whom Bush sponsored.<sup>136</sup>

These propositions explain why all five Obama nominees had substantial, careful analysis of competence in the panel phase. Article II envisions lawmakers will cautiously scrutinize picks' abilities, character, and temperament but must deemphasize ideology that enjoys little salience for whether centrist nominees in fact possess those attributes.<sup>137</sup> To the extent senators might have premised any of these nominees' rejection or delay on concerns about how they would conclude appeals, legislators should jettison this construct, which may undermine judicial independence.<sup>138</sup> The GOP ought to have eschewed additional filibusters with the recent nominees, because fine moderate possibilities deserve floor ballots, unless incisive review elicits numerous severe complications that ineluctably disqualify the excellent prospects.<sup>139</sup>

In sum, this examination reveals Millett, Pillard, and Wilkins comprised stellar nominees who have mainstream ideological perspectives and who did not satisfy extraordinary circumstances, as Republicans believed Halligan would.<sup>140</sup> It demonstrates the D.C. Circuit must have eleven jurists to address filings, a position

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135. For the panel, see Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035, 1039 (2009). For the floor, see Hulse, *supra* note 17; George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 38, 45.

136. See 159 CONG. REC. S3894 (daily ed. June 3, 2013) (statement of Sen. Leahy); Kevin Drum, *Senator Leahy and the Blue Slips*, MOTHERJONES (Mar. 4, 2013, 1:24 PM), <http://www.motherjones.com/kevin-drum/2013/03/senator-leahy-and-blue-slips> [<http://perma.cc/84P9-J5KR>]. Judge David Hamilton's confirmation process is instructive. When Democrats pursued cloture, ten GOP senators agreed, as he deserved a floor vote, but nine opposed approval. Tobias, *supra* note 12, at 2245. *But see id.* at 2266 n.149 (one GOP member favoring cloture on Halligan and 9th Circuit nominee Goodwin Liu).

137. See *Judicial Nominations 2001: Should Ideology Matter?: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. (2001); Gerhardt, *supra* note 135; Goldman et al., *supra* note 17, at 18. *But see* Owens et al., *supra* note 26, at 351; Douglas Laycock, Op-Ed., *Forging Ideological Compromise*, N.Y. TIMES, Sept. 18, 2002, at A31.

138. See generally Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999). Recent Supreme Court and D.C. Circuit nominees encountered this phenomenon. See Hatch, *supra* note 135, at 1041; Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, <http://www.nybooks.com/articles/archives/2009/sep/24/justice-sotomayor-the-unjust-hearings/> [<http://perma.cc/GL3E-4A3T>].

139. "Extraordinary circumstances" would constitute the severe complications. See *supra* notes 26, 60, 62. Requiring cloture votes on the five well-qualified, mainstream nominees and Liu shows extraordinary circumstances lacks vitality.

140. See *supra* note 60 and accompanying text. Had she won cloture, Halligan deserved full, rigorous debate on her fitness and a final vote.

the Judicial Conference recently affirmed.<sup>141</sup> Therefore, senators properly calibrated filibusters which allowed three nominees cloture and final votes.

### III. CONSEQUENCES

Supplying Millett, Pillard, and Wilkins yes or no ballots furnished critical specific advantages. Permitting votes meant the individuals garnered Senate confirmation and the court actually experienced a whole contingent for the first time in several decades,<sup>142</sup> which provided the circuit sufficient resources to promptly, economically, and fairly decide cases.<sup>143</sup> Appointing the remarkable, diverse jurists should improve understanding and resolution of crucial questions; curtail ethnic, gender, and corresponding prejudices that impair justice; and enlarge confidence in the bench.<sup>144</sup> The selections approved could also expand D.C. Circuit ideological equilibrium, but they will alter comparatively few appeals' disposition.<sup>145</sup>

Related persuasive justifications supported granting the three choices floor ballots. Because neither the President's well-qualified, moderate nominees nor concerns about caseload—an idea substantiated by the Judicial Conference recommendation that the appellate court warrants all the jurists—meets extraordinary circumstances, the nominees merit yes or no votes.<sup>146</sup> White Houses

141. Its regime, using conservative case estimates, eclipses the Court Efficiency Act ad hoc scheme, which gives the Eleventh Circuit a seat, as its jurists have long opposed more posts. *See The Federal Judgeship Act of 2013: Hearing Before the Subcomm. on Bankruptcy & the Courts of the S. Comm. on the Judiciary*, 113th Cong. 89–93 (2013) (statement of Joel F. Dubina, Judge, United States Court of Appeals for the 11th Circuit). *But see* Russell Wheeler, *Federal Judicial Nominations: Skunky D.C. Stats, Justified Ideological Nominations, Vacancies Without Nominees*, BROOKINGS (Nov. 4, 2013, 12:15 PM), <http://www.brookings.edu/blogs/fixgov/posts/2013/11/4-federal-judicial-nominations-dc-stats-vacancies-wheeler> [<http://perma.cc/9SKZ-VVQX>].

142. *See* U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY (May 1, 1991), *available at* <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1991/05/vacancies/pdf> [<http://perma.cc/NLF8-SB23>] (noting no vacancies on the D.C. Circuit).

143. *See supra* text accompanying notes 121–22. *But see supra* text accompanying notes 41, 50, 60–61, 91, 114.

144. *See supra* notes 121–24 and accompanying text. *But see supra* notes 91, 104, 106 and accompanying text.

145. *See* Lisa T. McElroy, *The Nomination of Three New Judges to the D.C. Circuit: To Support and Defend the Constitution*, 102 GEO. L.J. ONLINE 1 (2013); Josh Gerstein, *Judge: Obama Appointees Bring No Big Shift to D.C. Circuit*, POLITICO: UNDER THE RADAR (Oct. 30, 2015, 9:24 AM), <http://www.politico.com/blogs/under-the-radar/2015/10/judge-obama-appointees-bring-no-big-shift-to-dc-circuit-215379> [<http://perma.cc/3P4K-ZQAR>]; Linda Greenhouse, *By Any Means Necessary*, N.Y. TIMES, Aug. 20, 2014, [http://www.nytimes.com/2014/08/21/opinion/linda-greenhouse-by-any-means-necessary.html?\\_r=0](http://www.nytimes.com/2014/08/21/opinion/linda-greenhouse-by-any-means-necessary.html?_r=0) [<http://perma.cc/P4GM-MJAF>]; *supra* text accompanying notes 126–29. *But see* Owens et al., *supra* note 26, at 351; Orrin G. Hatch & C. Boyden Gray, *After Harry Reid, the GOP Shouldn't Unilaterally Disarm*, WALL ST. J., Nov. 6, 2014, at A17; Editorial, *Why They Packed the Court*, WALL ST. J., Sept. 8, 2014, at A18.

146. *See supra* notes 64, 140–41 and accompanying text. *But see* 159 CONG. REC. S7702 (daily ed. Oct. 31, 2013) (statement of Sen. McCain); *supra* notes 50, 60, 75, 92 and

may concomitantly evaluate designees' ostensible ideological views, especially to remedy or ameliorate chronic lack of balance, particularly at the D.C. Circuit.<sup>147</sup> Ideology simply does not constitute an extraordinary circumstance.<sup>148</sup> Chief Justice William Rehnquist's decisive admonishment rings true: The "right way [for making] a popular imprint on" the courts should be when the elected "President and the Senate have felt free to [consider nominees'] likely judicial philosophy."<sup>149</sup> Moreover, dogged GOP unwillingness to allow final ballots on three impressive centrist picks essentially nullified the will of the voters expressed in electing President Obama twice.<sup>150</sup>

Deployment of fifty-one, rather than sixty-seven, votes when amending filibusters to permit a majority ballot for cloture had some detrimental ramifications.<sup>151</sup> The nuclear option drastically worsened the fractious Republican-Democratic appointments relationship which governed a plethora of courts. Activating this mechanism critically accelerated the downward spiral, witnessed by three candidates' narrow approval margins, insistence that every subsequent pick secure cloture, the acute paucity of confirmations the next several months, the fifty-three present trial level openings, and the robust GOP dependence on technicalities when stalling nominees.<sup>152</sup> In fairness, the parties currently share responsibility for the pernicious appointments conundrum, as each capitalized on innovative devices that subverted the procedures.<sup>153</sup> For example, when the GOP implacably refused any of three sterling mainstream choices floor votes, Democrats perceived they had exhausted viable alternatives, which sparked the nuclear option's ignition.<sup>154</sup>

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accompanying text.

147. See Editorial, *The Homogenous Federal Bench*, N.Y. TIMES, Feb. 7, 2014, at A22.

148. See 159 CONG. REC. S8076 (daily ed. Nov. 18, 2013) (statement of Sen. Reid); *supra* notes 66, 126–27, 135, 137, 140 and accompanying text.

149. Wheeler, *supra* note 141; see 159 CONG. REC. S8657 (daily ed. Dec. 11, 2013) (statement of Sen. Toomey); 159 CONG. REC. S5764 (daily ed. July 18, 2013) (statement of Sen. Alexander); Peters, *supra* note 16.

150. See Wheeler, *supra* note 141; *supra* note 124.

151. Carl Hulse, *Post-Filibuster, Obama Faces New Anger over Judicial Choices*, N.Y. TIMES, Feb. 28, 2014, at A14; see Burgess Everett & Seung Min Kim, *GOP May Abolish Supreme Court Filibusters*, POLITICO (Jan. 23, 2015, 6:36 PM), <http://www.politico.com/story/2015/01/gop-may-abolish-supreme-court-filibusters-114540.html> [http://perma.cc/MV8J-3H77].

152. See *supra* notes 96, 110, 118, 129–30 and accompanying text. The GOP delayed fifteen nominees' panel votes and returned fifty-five at 2013's end. No district judge won approval for sixty-five days, gridlock that cloture broke. 160 CONG. REC. S1300 (daily ed. Mar. 5, 2014) (statement of Sen. Leahy); Jeremy W. Peters, *White House Steps Up Effort to Confirm Federal Judges*, N.Y. TIMES, Apr. 29, 2014, at A13; see CARDMAN, *supra* note 70, at 2–3 (2013–15). But see U.S. COURTS, VACANCIES IN THE FEDERAL JUDICIARY 5 (Jan. 1, 1991), available at <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1991/01/vacancies/pdf> [http://perma.cc/S6JZ-5XKW] (fewest appellate vacancies since 1990); Peters, *supra* note 16 (same).

153. They used similar ideas when roles reversed. See *supra* text accompanying notes 15–19, 91.

154. See 159 CONG. REC. S8414–15 (daily ed. Nov. 21, 2013) (statement of Sen. Reid); 159 CONG. REC. S8294–97 (daily ed. Nov. 20, 2013) (statements of Sens. Merkley and Udall);

Republicans correspondingly proclaimed that detonation eliminated all the chamber rules and might jeopardize the Senate institutionally,<sup>155</sup> while the GOP consistently abused prenomination customs—namely swiftly proffering able candidates, blue slip practices, and multiple other conventions, such as unanimous consent—to block possibilities’ nomination and confirmation.<sup>156</sup>

#### IV. SUGGESTIONS

During the short term, few pertinent endeavors respecting appointments can be implemented, as the D.C. Circuit has an entire complement and, thus, currently lacks vacancies. The Judiciary Committee, under the Bankruptcy and the Courts Subcommittee’s auspices, will perhaps further investigate the vigorously disputed question of whether the circuit needs every jurist, and it could assemble, canvass, and synthesize relevant empirical information on caseloads and workloads. However, this would duplicate responsibilities that the conference has efficaciously discharged for years when it affords Congress judgeship recommendations by aggregating conservative docket and workload projections that reflect empirical data.<sup>157</sup> Indeed, the subcommittee conducted a late 2013 hearing at which the chair of the applicable conference panel explicated the analytical methodology that underlay its finding that the court requires eleven jurists.<sup>158</sup>

Nevertheless, this appellate concept may yield less nuanced information than the analogous district court approach, which assigns rather precise weights to specific cases, so the conference probably should attempt to extract relatively precise conclusions from systematically accumulated data.<sup>159</sup> Now that Grassley has become the Judiciary Chair, he might pursue greater information or seek adoption of the Court Efficiency Act.<sup>160</sup> Republicans and Democrats can revisit the ample

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Peters, *supra* note 16; ‘*This Is a Congress That’s Really Doing Nothing.*’ Says NYT Reporter, NPR (Aug. 13, 2014, 2:32 PM), <http://www.npr.org/2014/08/13/340112138/-this-is-a-congress-that-s-really-doing-nothing-says-nyt-reporter> [<http://perma.cc/MC6E-3KDK>]. But see 159 CONG. REC. at S8421–23 (daily ed. Nov. 21, 2013) (statement of Sen. Levin).

155. See 159 CONG. REC. S8574–79 (daily ed. Dec. 9, 2013) (statement of Sen. Alexander); 159 CONG. REC. S8415–16 (daily ed. Nov. 21, 2013) (statement of Sen. McConnell).

156. See 160 CONG. REC. S5364 (daily ed. Sept. 8, 2014) (statement of Sen. Leahy); Ryan C. Black, Anthony J. Madonna & Ryan J. Owens, *Qualifications or Philosophy? The Use of Blue Slips in a Polarized Era*, 44 PRESIDENTIAL STUD. Q. 290 (2014); Goldman et al., *supra* note 17, at 16; Burgess Everett, *How the Senate Reshaped the Courts*, POLITICO (Aug. 22, 2014, 5:03 AM), <http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238> [<http://perma.cc/LG8U-SWKD>]; *supra* notes 152–53.

157. See *supra* notes 141, 146 and accompanying text.

158. Hearing, *supra* note 141, at 5–7, 33–48 (statement of Timothy M. Tymkovich, Chair, Judicial Conference Comm. on Judicial Resources).

159. No district-like regime exists, so it may craft “an empirically based, conceptually grounded [one] that is more precise than the slightly adjusted raw filings now used as a guideline.” Wheeler, *supra* note 141. This and agency appeals’ huge records may explain the parties’ disparate views on caseload. See *supra* notes 42, 46, 63.

160. See *supra* notes 78, 141 and accompanying text; see also David Catanese, *Chuck Grassley’s Gavel Year*, U.S. NEWS & WORLD REP. (Jan. 28, 2015, 12:01 AM), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year>

controversy about the D.C. Circuit by ascertaining whether collection of additional material would permit comparatively sophisticated determinations and, if true, whether the refinements demonstrate the judicial contingent's number warrants adjustment.

Over the longer term, the parties should craft relatively permanent, effective solutions for vexing problems that attend selection. Of course, were partisanship and ideology to continue driving appointments, the complications may essentially be intractable. Notwithstanding whose representations are correct, so long as each participates in the counterproductive dynamics while staunchly regarding any concession to be unilateral disarmament, limited progress will occur.

Therefore, Republicans and Democrats should explore promising remedies. First, they might deftly restore numerous customs which dominated as recently as Bush's tenure. Democrats may seriously ponder reinstating the sixty votes that were necessary for cloture, if the GOP agrees to up or down ballots respecting talented moderate district nominees.<sup>161</sup> Both parties should concomitantly think about carefully resurrecting the Gang of 14 and defining with enhanced particularity its extraordinary circumstances metric.<sup>162</sup>

Rather dramatic avenues can also be reviewed. For instance, Democrats could enable Republicans to designate someone who fills the next Obama administration D.C. Circuit vacant post or alternate future candidates, thus inaugurating a bipartisan submission process.<sup>163</sup> Republicans and Democrats might correspondingly examine ways to sharply restrict the disadvantages which rampant partisanship and singular concern about ideology directly provoke. For example, no reasons compel assigning the D.C. Circuit abundant jurisdiction over contentious and delicate issues regarding military commissions, terrorism, and certain agency decisions.<sup>164</sup> A nonpartisan, multibranch expert group can rigorously study the difficulties that plague

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[<http://perma.cc/6NDZ-4GJH>]; Phelps, *supra* note 23.

161. Reverting to sixty votes could be premature but merits analysis. See Carl Hulse, *Uniting To Take Congress, G.O.P. Tries To Become the Party of 'Yes'*, N.Y. TIMES, Aug. 10, 2014, at A1. Strong consensus Bush district picks won prompt approval, especially at recesses. See Sheldon Goldman, Sara Schiavoni & Elliot Slotnick, *W. Bush's Judicial Legacy*, 92 JUDICATURE 258, 262 (2009); Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal To Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 292 (2012).

162. Dockets and ideology are not extraordinary. See *supra* notes 17, 66, 140, 146 and accompanying text; see also Dahlia Lithwick, *Extraordinary Hypocrisy: How Republican Senators Justified Their Decision To Kill the Nomination of Goodwin Liu*, SLATE (May 19, 2011, 7:17 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/05/extraordinary\\_hypocrisy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/extraordinary_hypocrisy.html) [<http://perma.cc/U2N9-DNS2>].

163. Some senators alternate picks. Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 790 (2010). The ideas in the text may attend a U.S. or D.C. Circuit judgeship bill, which takes effect in 2017, so neither party would realize immediate advantage because the appointing President would not be known. Democrats should assume the lead, as the GOP remains angry. See Hulse, *supra* note 151.

164. 10 U.S.C. § 950g (2012) (commissions); 42 U.S.C. § 7607(b) (2012) (EPA); see *supra* note 10.

confirmations while articulating a number of constructive suggestions which the 2017 President and Senate could in turn evaluate.<sup>165</sup>

#### CONCLUSION

President Obama recently appointed three strong centrist aspirants to the D.C. Circuit: Patricia Millett, Cornelia Pillard, and Robert Wilkins. Because no designee invoked extraordinary circumstances, they received minimal substantive debate with positive or negative committee approval votes. When Republicans continually delayed all individuals' final ballots, the majority released the nuclear option which yielded confirmations. The Senate appropriately chose to vote on Millett, Pillard, and Wilkins. Nonetheless, unleashing this crucial weapon has further exacerbated severely dysfunctional appointments relations. Therefore, the parties must consider ways to arrest the deterioration which infects selection for the D.C. Circuit and other courts and erodes justice over the 114th Congress now that the GOP possesses a Senate majority and has confirmed a minuscule number of judges this year.

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165. One idea is a panel that sends Presidents names. Tobias, *supra* note 12, at 2256. Some ideas which treat other courts' issues merit review. *See id.* at 2255–66; Shenkman, *supra* note 161, at 298–311.

